IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

EZEQUIEL GUTIERREZ,	)	
Employee/Appellant,	)	
v.	)	C.A. No. N18A-10-009 RRC
JAMESTOWN PAINTING,	)	
Employer/Appellee.	)	

Submitted: January 24, 2019
Decided: February 26, 2019

On Appeal from the Industrial Accident Board.
AFFIRMED.

MEMORANDUM OPINION

Heather A. Long, Esquire, Kimmel, Carter, Roman, Peltz & O'Neill P.A., Newark, Delaware, Attorney for Appellant Ezequiel Gutierrez.

Nathan V. Gin, Esquire, Esquire, Elzufon Austin & Mondell, P.A., Wilmington, Delaware, Attorney for Appellee Jamestown Painting.

COOCH, R.J.

I. INTRODUCTION

This is Ezequiel Gutierrez' ("Employee" or "Appellant") appeal from an October 3, 2018, decision of the Industrial Accident Board ("Board") denying Employee's Petition to Determine Additional Compensation Due. Employee had sought additional compensation for a right shoulder injury and a cervical spine injury allegedly related to a work accident in which Employee's right hand was crushed by a large steel elevator door. Employee argues that the Board's decision to deny his

Petition is not supported by substantial evidence, and could not have been fairly and reasonably reached in light of the evidence Employee presented. Further, Employee contends that the Board abused its discretion because the Board did not accord Employee's treating physicians substantial weight.

Jamestown Painting ("Employer" or "Appellee")[1] argues that the Board's decision is supported by substantial evidence, that the Board did not abuse its discretion when it found Employer's expert more persuasive than Employee's experts, and that the Board did not otherwise err as a matter of law.

After review of the parties' contentions and the record, the Court concludes that the Board's decision was supported by substantial evidence and that the Board otherwise committed no error of law. Accordingly, the decision of the Board is affirmed.

II. FACTS AND PROCEDURAL HISTORY

On December 2, 2016, Employee was working for Employer when Employee suffered a crush injury to his right hand and wrist.[2] Employee was standing in an elevator door frame helping a coworker install a large, oversized steel elevator control door, when the coworker dropped the steel door. The door fell towards Employee. In quick succession, Employee flung his arms out to avoid being completely crushed and caught the steel door falling towards him, but the steel door forced his right arm in between the door and the doorframe, crushing his wrist and hand. After Employee was dislodged from the doorframe, Employee's supervisor advised Employee to apply ice to the injury. Experiencing continued pain, Employee requested medical attention. On December 30, 2016, Employee presented to Work Pro for medical treatment.

At his initial Work Pro appointments, Employee complained of pain in his right hand and wrist, and indicated upper extremity numbness. At a subsequent visit, Employee reasserted his previous complaints, and added a complaint of weakness in his right upper extremity. On February 4, 2017, Work Pro transferred Employee to the care of Dr. Peter Townsend. An injection into Employee's right wrist failed to alleviate the pain. Dr. Townsend then performed a wrist fusion surgery on May 4,

[1] The exact name of the business entity is unclear from the record.

[2] *Ezequiel Gutierrez v. Jamestown Painting*, Hearing No. 1466440, at 1, 6–7 (I.A.B. Oct. 4, 2018) (hereinafter IAB Decision).

2017, "wherein Dr. Townsend removed a bone from the wrist and fused it. Dr. Townsend also moved one of [Employee's] thumb tendons and performed a cleanup around one of the nerves in the wrist."[3]

In the days following the wrist surgery, Employee was rushed to the emergency room twice because of "uncontrollable...10 out of 10" pain.[4] At this time, six months post-accident, Employee complained of a sharp, burning, electrical shoulder pain that extended to his fingers; of a separate shoulder pain with spasms in his right bicep; and of neck pain that radiated down into the shoulder. Over the next few days Employee received treatment at Christiana Care where he eventually underwent a right axillary nerve block to stymie the neck and shoulder pain. After discharge from Christiana Hospital, Employee continued treatment with Dr. Townsend from May 26, 2017 until August 8, 2017. Employee continued to complain of pain and stiffness in his neck and right shoulder. At some point thereafter,[5] Employee formally indicated to Employer that he would seek additional compensation for the cervical spine and right shoulder pain, alleging that the pain was related to the work accident.

On December 28, 2017, Employer filed a Petition to Terminate Benefits, alleging Employee was no longer totally disabled from the work accident. In connection with this petition, Employer tasked Dr. Eric Schwartz, an orthopedic surgeon, to examine Employee and to review Employee's prior medical records. Dr. Schwartz' review of Employee's prior medical records revealed that Employee has been treated "for approximately 15 years for pain management of the neck and back."[6] However, when Employee spoke with Dr. Schwartz, Employee denied prior treatment to his neck or right shoulder, contrary to his medical records.[7] From his evaluation Dr. Schwartz opined that the specific mechanism of the injury, a crush injury to the right wrist, could not cause the pain in Employee's right shoulder and cervical spine. According to Dr. Schwartz, there was no evidence of a fall or twist,

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[3] Appellant's Opening Br., D.I. 6, at 4 (Dec. 20, 2018).
[4] *Id.* at 4–5.
[5] The Board noted that Employee "notified Employer of his claims though the course of litigation, but apparently, not the Industrial Accident Board. The hearing was scheduled as a Termination Petition only. At the hearing, [Employee] indicated that he had filed a Petition to Determine Additional Compensation Due..." but could provide no evidence of such. IAB Decision, at 2. The Board found no filings, and Employee conceded that the petition had not been filed. *Id.* Nevertheless, the Board proceeded on the merits of Employee's petition. Employer has not argued on appeal that the Board committed error by addressing Employee's unfiled petition, and thus the Court will not address the issue here.
[6] IAB Decision, at 4.
[7] *Id.*

no complaints of neck or shoulder pain at the initial medical examinations after the injury, and the initial medical examinations noted "normal sensation to light touch and normal" reflexes of the upper extremities.[8]

In January 2018, Employee began treatment with Dr. Joseph Mesa, an orthopedic surgeon, and Dr. Mark Eskander, an orthopedic surgeon. Employee underwent an MRI of his right shoulder for further diagnosis. According to Dr. Mesa, the MRI showed a superior labral tear in the right shoulder with a small cyst. Dr. Mesa opined that the tear was related to the work injury. Dr. Eskander's separate examination and treatment of Employee led Dr. Eskander to opine that Employee suffered from cervical disc herniation with spinal cord compression and nerve root compression, caused by the work accident. Dr. Eskander was of the opinion that the wrist injury was severe enough to be a "distracting injury" from the shoulder and cervical spine injuries. Dr. Schwartz disagreed with Drs. Mesa and Eskander that the wrist injury would be a distracting injury, and opined that if the work accident caused a neck or shoulder injury Employee would have indicated pain immediately. Therefore, Dr. Schwartz opined, it was not possible to relate Employee's neck and shoulder pain to the work accident.

By March 15, 2018, Drs. Mesa and Eskander released Employee to work full-time in a sedentary capacity. On July 9, 2018, the Board heard testimony from Employee, Dr. Mesa, Dr. Eskander, Dr. Schwartz, and various witnesses regarding Employee's skills and future employability. The Board ultimately found Employee lacked credibility, especially in regards to his prior pain medication use. The Board further found Dr. Schwartz more persuasive than Employee's treating physicians, primarily because the Board found that Dr. Schwartz reviewed Employee's prior medical records in a more comprehensive manner than had the other doctors.

The Board by decision dated October 4, 2018 denied Employee's Petition for Additional Compensation and granted Employer's Petition for Termination of Benefits. Based on the persuasiveness of the experts' opinions and the extent of medical records reviewed, the Board found that Employee failed to establish that his neck and shoulder injuries were related to the work accident. Further, the Board found that Employee's wrist injury no longer warranted total disability benefits of "$689.45 per week."[9] The Board terminated Employee's total disability status.[10] The Board placed Employee on partial disability status, based on the then existing

[8] *Id.* at 36.
[9] *Id.* at 2.
[10] *Id.* at 49.

disabling effect of Employee's wrist injury, with compensation at the rate of "$466.55 per week."[11] Employee was also awarded payment of his medical witness fees in accordance with 19 *Del. C.* 2322(e).[12] This appeal followed.

III. THE PARTIES' CONTENTIONS

A. Employee's Contentions

First,[13] Employee contends that the Board abused its discretion by concluding that Employee's right shoulder and cervical spine injuries were unrelated to the work injury. Employee argues that the Board improperly ignored the testimony of Dr. Eskander and Dr. Mesa, and relied exclusively on Dr. Schwartz' opinions. Employee argues that the Board "exceeded the bounds of reason"[14] and acted contrary to Delaware law because it did not accord Employee's treating physicians with "substantial weight."[15]

Second, Employee argues that the Board's decision finding his cervical spine and right shoulder injuries were unrelated to the work accident is not supported by substantial evidence. Employee contends that the Board "relied exclusively on the testimony of Dr. Schwartz" while essentially ignoring the testimony of Dr. Eskander and Dr. Mesa.[16] Employee argues that there is an "exceeding amount of evidence" to support a finding that the neck and shoulder injuries were related to the work accident.[17] Essentially, Employee contends that the total weight of all the evidence presented to the Board weighed in favor of his petition, and thus the Board's contrary decision cannot be supported by substantial evidence.

B. Employer's Contentions

Employer argues that the Board was permitted to reject the testimony of Employee, Dr. Mesa, and Dr. Eskander on the basis of credibility. Employer contends that the Board, in its discretion as trier of fact, gave more weight to certain

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[11] *Id.* at 51.
[12] *Id.* at 52.
[13] Employee does not argue on appeal that the Board committed error in granting Employer's Petition to Terminate Benefits. Employee's arguments on appeal only address the Board's decision to deny Employee's Petition for Additional Compensation Due.
[14] Appellant's Opening Br., at 19.
[15] *Id.* (quoting *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1065 (Del. 1999)).
[16] Appellant's Opening Br., at 13, 16.
[17] *Id.* at 13.

evidence presented by Employer than the Board gave to evidence presented by Employee. As such, the issue is wholly factual in nature. Employer argues that Dr. Schwartz' credible testimony is substantial evidence which supports the Board's conclusions.

IV. STANDARD OF REVIEW

In reviewing a decision of the Board, "[t]he function [of this] Court is limited to determining whether substantial evidence supports the Board's decision regarding findings of fact and conclusions of law and is free from legal error."[18] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[19] If the Board's decision is free from legal error and supported by substantial evidence, this Court must sustain the Board's decision even if this Court might have decided the case differently if it had come before it in the first instance.[20] This Court does not sit as trier of fact, nor should this Court replace its judgment for that of the Board.[21] "The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted."[22] "The burden of persuasion is on the party seeking to overturn a decision of the Board to show that the decision was arbitrary and unreasonable."[23] In this process, "the Court will consider the record in the light most favorable to the prevailing party below."[24]

V. DISCUSSION

A. The Board did not abuse its discretion when it found Dr. Schwartz more persuasive than Employee's experts.

The Court finds that the Board did not abuse its discretion, or otherwise commit an error of law, when it found Dr. Schwartz more persuasive than Dr. Mesa

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[18] *Holowka v. New Castle Cty. Bd. of Adjustment*, 2003 WL 21001026, at *3 (Del. Super. Ct. Apr. 15, 2003) (citing 29 *Del. C.* § 10142).
[19] *Forrey v. Sussex Cty. Bd. of Adjustment*, 2017 WL 2480754, at *3 (Del. Super. Ct. June 7, 2017).
[20] *Id.*
[21] *Holowka*, 2003 WL 21001026, at *4.
[22] 29 *Del. C.* § 10142(d).
[23] *Forrey*, 2017 WL 2480754, at *3 (quoting *Mellow v. Bd. of Adjustment of New Castle Cty.*, 565 A.2d 947, 955 (Del. Super. Ct. 1988)).
[24] *Holowka*, 2003 WL 21001026, at *4 (quoting *Gen. Motors Corp. v. Guy*, 1991 WL 190491, at *3 (Del. Super. Ct. Aug. 16, 1991)) (internal brackets omitted).

and Dr. Eskander. When "the Board [is] presented with differing medical testimony [the Board is] free to reject, in full or in part, the testimony of one physician based on its experience in gauging the testimony of witnesses who give conflicting testimony."[25] Furthermore, when weighing testimony of experts, treating physicians are generally accorded "substantial weight" compared to non-treating physicians.[26] In *Diamond Fuel Oil v. O'Neil*, the Delaware Supreme Court explained that this is partly because treating physicians are recognized to have great familiarity with a patient-claimant's condition.[27] Importantly, *Diamond Fuel* does not stand for the proposition that the Board must automatically accept a treating physician's opinion over another's.

In its written decision the Board expressly addressed the weight afforded to treating physicians versus non-treating phsyicians. As to Dr. Mesa, the Board explained that the facts of this specific case demonstrated that Dr. Mesa did not have the familiarity that was assumed in *Diamond Fuel*. Dr. Mesa first saw Employee over one year after the work accident, and only for a few times. The Board believed that Dr. Schwartz' examination of Employee and thorough record review provided him with just as much, if not more, familiarity with Employee's condition as Dr. Mesa.[28] As to Dr. Eskander, the Board noted several instances where he misunderstood or was unaware of certain aspects of Employee's medical history. The Board concluded that these misunderstandings demonstrated Dr. Eskander's lack of familiarity with Employee's condition.[29] Thus, the Board did not believe Dr. Eskander's opinion automatically warranted more weight than Dr. Schwartz' opinion. Given Dr. Schwartz' apparent greater familiarity with Employee's condition and his apparent persuasiveness, the Board accepted Dr. Schwartz' opinion over Drs. Mesa and Eskander's.[30]

It is well established that deference is owed to the Board's specialized competency to determine the credibility of witnesses.[31] The Board, well within its discretion, chose Employer's expert over Employee's experts, and articulated its reasons for doing so. Although treating physicians are generally accorded substantial

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[25] *Roberts v. Capano Homes, Inc.*, 1999 WL 1222699, at *2 (Del. Super. Ct. Nov. 8, 1999) (citing *Simmons v. Delaware State Hosp.*, 660 A.2d 384, 388 (Del. 1995)).
[26] *Diamond Fuel Oil v. O'Neil*, 734 A.2d 1060, 1065 (Del. 1999) (citing *Appeal of Kehoe*, 686 A.2d 479, 753 (N.H. 1996)).
[27] *Id.*
[28] *See* IAB Decision, at 43.
[29] *See id.* at 40–41.
[30] *Id.* at 45.
[31] *Holowka*, 2003 WL 21001026, at *3 (citing 29 *Del. C.* § 10142).

weight, the Board explained why such weight was not proper in this matter. It appears to the Court that the Board's determination is free from legal error. Even if the Court may have decided the case differently in the first instance, the Court will not supplant its own judgment for that of the Board.

B. Employer's expert's testimony constituted substantial evidence.

In reviewing for substantial evidence, the task of this Court is to determine if the evidence supporting the Board's conclusion is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. As such, it is not proper for this Court to weigh the evidence presented at the hearing and to decide the matter *de novo*. That duty lies with the Board. Instead, the Court must determine if the evidence the Board ultimately accepted is adequate to support its conclusion.

The Board determined that the relation between Employee's cervical spine complaints and the work accident was a dispute between two medical experts: Dr. Eskander and Dr. Schwartz. Dr. Eskander opined that the cervical spine complaints were related to the work accident, and that Employee's wrist injury was a distracting injury which prevented Employee from reporting cervical spine problems at the initial medical examinations. Dr. Schwartz disagreed, and opined that given Employee's history of chronic neck pain there should not have been any "masking."[32] Dr. Schwartz testified that if Employee's cervical spine injury related to the work accident, cervical myelopathy would have presented in the early medical records, and Dr. Townsend would have picked up on spinal cord compression symptoms at the initial medical examinations. No such symptoms were reported until six months after the work accident.

As for the right shoulder complaints, the Board understood the issue to be a dispute between Dr. Schwartz and Dr. Mesa. Dr. Mesa opined that a right shoulder labral tear, discovered in an MRI taken one year after the work accident, was related to the work accident. Further, Dr. Mesa agreed with Dr. Eskander that the wrist injury was a distracting injury. Although Dr. Schwartz did not review the MRI, he contended that the mechanism of injury, a crush injury, would not support a right shoulder injury. Dr. Schwartz also stated that even if the mechanism of the injury could cause shoulder symptoms, those symptoms would have presented immediately if the shoulder injury was caused by the work accident. Evidence of the shoulder symptoms does not appear until six months after the work accident.

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[32] IAB Decision at 37.

The Board found Dr. Schwartz more persuasive on both accounts. According to the Board, Dr. Schwartz demonstrated a more complete understanding of Employee's prior medical records and medical history than Employee's treating physicians. Dr. Mesa only met with Employee a few times, whereas Dr. Schwartz conducted a "thorough record review."[33] Dr. Eskander formed his opinion on the representation that Employee had no prior neck pain treatment before the work accident, but Dr. Schwartz' review of Employee's medical records and Dr. Townsend's notes demonstrated that Employee was indeed treated for neck pain prior to the work accident. Given the timing of the symptoms, Employee's experts' misunderstanding of Employee's history, and Employee's own equivocations regarding his past pain medication use,[34] the Board ultimately found Dr. Schwartz' opinion that the cervical spine and right shoulder complaints were not related to the work accident to be the most persuasive opinion.

As is often the case, "the evidence was definitely in conflict, and the substantial evidence requirement [could have been] satisfied either way[.]"[35] For example, Employee highlights numerous instances where Dr. Schwartz' conclusions directly conflicted with Dr. Mesa's and Dr. Eskander's conclusions.[36] However, the Board thoughtfully considered each of the experts' conclusions and the conflicts between those conclusions, and thoroughly detailed each conclusion in the written decision. Where, as in the instant case, substantial evidence exists to support conflicting expert opinions, the Board is free to choose one expert's testimony over that of another.[37] The Board determined that Dr. Schwartz testified "believably" on each issue.[38] Importantly, the Board also concluded that Employee's experts did not testify persuasively,[39] and that Employee's testimony "detract[ed] from his credibility and cast doubt" on his assertions.[40]

The Board based its decision on Dr. Schwartz' examination of Employee, his comprehensive and thorough review of Employee's medical records, and his

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[33] *Id.* at 43.

[34] *See id.* at 39–40. Illustrating Employee's apparent lack of credibility, the Board noted Employee's incorrect statements to both the Board and to Dr. Schwartz regarding Employee's pain management history, which included prescribed narcotic usage over a fifteen-year period. *Id.*

[35] *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982).

[36] *See* Appellant's Opening Br., at 9, 12–18; Appellant's Reply Brief, D.I. 9, at 5, 7–11 (Jan. 24, 2019).

[37] *Johnson v. E.I. Dupont de Nemours & Co.*, 2000 WL 33115805, at *4 (Del. Super. Ct. Oct. 4, 2000) (citing *Boyd v. Chrysler Corp.*, 558 A.2d 291 (Del. 1989)).

[38] IAB Decision, at 38.

[39] *See id.* at 40–41, 44–45.

[40] *Id.* at 39.

persuasive expert testimony. The Court finds that this evidence is such relevant evidence that a reasonable mind would conclude supports the Board's determination to deny Employee's Petition for Additional Compensation Due. Therefore, the Court finds that the decision of the Board is supported by substantial evidence.

VI. CONCLUSION

For the foregoing reasons, the decision of the Industrial Accident Board is **AFFIRMED.**

IT IS SO ORDERED.

Richard R. Cooch, R.J.

cc: Prothonotary
Industrial Accident Board